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No. 90-611

DEC 12 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

REGIS ANN GOULD, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the applicable two-year limitations statute, 28 U.S.C. 2401(b), barred petitioner's medical malpractice action under the Federal Tort Claims Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 78a-119a) is reported at 905 F.2d 738. The panel opinion of the court of appeals (Pet. App. 21a-75a) is reported at 884 F.2d 785. The opinion of the district court (Pet. 1a-12a) is not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 8, 1990. On August 31, 1990, the Chief Justice issued an order extending the time within which to file a petition for a writ of certiorari to and including Saturday, October 6, 1990. The petition for a writ of certiorari was filed on October 9,

1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late August and early September 1980, petitioner's husband, Gary Francis Gould, received medical care from Dr. O'Rourke and Dr. Nathanson, two physicians employed by the United States Public Health Service.[1] Dr. O'Rourke first treated Gould at the South County Family Health Care Corporation in Anne Arundel County, Maryland. Gould's condition deteriorated. As a result, Dr. O'Rourke admitted him to the Anne Arundel General Hospital, where Drs. O'Rourke and Nathanson treated him. Dr. O'Rourke ultimately diagnosed Gould as suffering from Rocky Mountain Spotted Fever. Gould died in the hospital on September 4, 1980. At that time, petitioner knew her husband's treating physicians and was aware of what she later alleged to be the cause of his death, *i.e.*, the doctors' negligent delay in diagnosing Gould's condition. Pet. App. 81a-84a.

Three years later, on September 2, 1983, petitioner filed a malpractice claim against Drs. O'Rourke and Nathanson before the Maryland Health Claims Arbitration Board.[2] In December 1985, the Board ulti-

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[1] The doctors were members of the National Health Service Corps established under 42 U.S.C. 254(d). As the court of appeals explained, "[t]he purpose of the Corps is to provide health care providers in areas designated as health manpower shortage areas." Pet. App. 81a-82a. Anne Arundel County was such an area.

[2] In response to inquiries by petitioner's attorney made in August 1983, the United States Department of Health and Human Services notified him in early September that the doctors were federal employees when they treated Gould. Pet. App. 83a-84a.

mately dismissed petitioner's claim, concluding that the doctors could not be sued in a state forum because they were employed by the federal government and the alleged malpractice fell within the scope of their employment. Pet. App. 85a-86a; see 28 U.S.C. 1346(b).

2. Meanwhile, in August 1985, petitioner filed an administrative tort claim with HHS under the Federal Tort Claims Act, alleging that the doctors' negligent treatment caused her husband's death. In August 1986, HHS denied the claim on the ground that it was barred by the FTCA's two-year limitations statute, 28 U.S.C. 2401(b). Pet. App. 86a.

In February 1987, petitioner filed this federal court action under the FTCA. In response to HHS's motion to dismiss the action as untimely under 28 U.S.C. 2401(b), petitioner contended that since "the statute of limitations should be tolled until the legal identity of the tortfeasor is known," *i.e.*, September 1983, the action was not time-barred. Pet. App. 8a.

In January 1988, the district court granted the government's motion and dismissed petitioner's action. Pet. App. 1a-14a. The court determined that petitioner's "cause of action accrued on September 4, 1980. At that time, she was sufficiently armed with the knowledge of injury to her decedent and what caused it[,] which is all that [*United States* v. *Kubrick*, 444 U.S. 111 (1979)] demands." Pet. App. 8a. The court also rejected petitioner's claim that "accrual is tolled until she ascertained the legal identity of the tortfeasor." The court pointed out that petitioner

> failed to make any inquiry until August 8, 1983 about the doctor's [*sic*] employment status. Upon doing so, she was promptly informed of

> their status as federal employees. No impediment existed as to determining the doctors' legal identity. With the death and its cause discovered on September 4, 1980, due diligence is not present when an initial inquiry about who employed the tortfeasors is made 35 months later and then instituting the administrative tort claim two years after the inquiry.

Id. at 9a-10a. Accordingly, the court concluded that

> [t]o relieve [petitioner] * * *, through postponement of her cause of action based on an accrual problem, * * * "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government."

Id. at 11a (quoting *Kubrick*, 444 U.S. at 123).

3. A divided panel of the court of appeals reversed and remanded, Pet. App. 21a-36a, concluding that "until [petitioner] discovered that O'Rourke was a federal employee * * *, she simply had no indication that O'Rourke and Nathanson were United States Public Health Service employees and thus had no reason to suspect that her claim was governed by the FTCA," *id.* at 35a. In the court's view,

> [t]o deprive [petitioner] of the federal cause of action under these circumstances would be both unfair and contrary to the Supreme Court's decision in *Kubrick* that the FTCA limitation period begins to run only when a claimant becomes aware of the "critical facts" constituting the "cause" of an actionable injury.

Id. at 36a.

Judge Chapman dissented. Pet. App. 37a-75a. After noting this Court's holding in *Kubrick* that a

tort claim in medical malpractice cases accrues when the plaintiff discovers "both his injury and its cause," Pet. App. 49a (quoting *Kubrick*, 444 U.S. at 120), Judge Chapman reasoned that petitioner's claim accrued on the date of her husband's death—September 4, 1980. At that time, Judge Chapman stated, petitioner was "sufficiently armed * * * with the 'critical facts' to investigate the claim and present it within the two-year statute of limitation." Pet. App. 51a. He rejected the majority's suggestion that "cause" necessarily includes the legal identity of the tortfeasor, *id.* at 52a n.3 (citing *Zeleznik* v. *United States*, 770 F.2d 20, 23 (3d Cir. 1985), cert. denied, 475 U.S. 1108 (1986)), and pointed out that the court's rule would release plaintiffs from the duty to "investigate or to take any action to determine the employment status of an alleged tortfeasor," Pet. App. 60a. Here, Judge Chapman determined,

> [t]here is no evidence that [petitioner] sought to ascertain or was denied access to information concerning the employment status of the treating physicians prior to the expiration of the limitation period. Neither is there evidence that the treating physicians "held themselves out as agents and employees of the private health facility" so as to mislead or deceive the plaintiffs or otherwise hide their legal identity as federal employees."

Id. at 61a-62a. In these circumstances, Judge Chapman concluded, the district court correctly dismissed petitioner's claim as barred by the two-year limitations period.

4. The court of appeals granted the government's suggestion of rehearing en banc, and, by a 9-1 vote, affirmed the district court's order dismissing petitioner's action. Pet. App. 78a-119a. Judge Chapman,

writing for the en banc majority, rearticulated the reasoning of his panel dissent. *Id.* at 79a-119a.[3]

ARGUMENT

1. Petitioner principally contends (Pet. 9-22) that, under the rationale of *United States* v. *Kubrick*, 444 U.S. 111 (1979), the applicable two-year statute of limitations of the FTCA, 28 U.S.C. 2401(b), did not begin to run until she learned that the United States was the employer of the alleged tortfeasors. In *Kubrick*, this Court held that it was sufficient for accrual of an FTCA claim in a malpractice case that the plaintiff "was aware of his injury and its probable cause." 444 U.S. at 118. In so holding, the Court explained that "a plaintiff's ignorance of his legal rights," *i.e.*, whether the facts may constitute legal malpractice actionable in tort, should not be treated identically for purposes of the statute of limitations as "his ignorance of the fact of his injury or its cause." *Id.* at 122. An individual who does not know the fact of his injury or its cause often is unable to file a lawsuit due to no fault of his own, because his injury may be "unknown or unknowable until the injury manifests itself" and "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiffs or at least very difficult to obtain." *Ibid.* By contrast, an individual who is "in possession of the critical facts that he has been hurt and who has inflicted the injury * * * is no longer at the mercy of the latter." *Ibid.* Rather, as the Court pointed out, "[t]here are others who can tell him if he has been wronged, and he need only ask." *Ibid.*

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[3] Judge Sprouse, the author of the panel majority opinion, dissented for the reasons expressed in that opinion. Pet. App. 119a.

In this case, as the en banc court of appeals correctly determined, information about the doctors' employment status is not a "critical fact" that left petitioner "at the mercy of the alleged tortfeasors." *Kubrick*, 444 U.S. at 122. Armed with knowledge of the alleged tortfeasor's identity, "the odds are" (*ibid.*) that a plaintiff such as petitioner will be able to discover, through reasonably diligent investigation, who should be a defendant. *Ibid.* Here, petitioner knew the alleged tortfeasors' identities, and to learn the identify of their employer, she "need only [have] ask[ed]." *Ibid.* Indeed, HHS promptly provided her with that information when she finally did ask for it, see Pet. App. 84a, and petitioner can point to nothing in the record that would have prevented her from requesting this information before the limitations period had run, see *id.* at 112a.[4] It is thus apparent that petitioner failed to exercise due diligence in pursuing her claim. *Kubrick* does not call for releasing a plaintiff—who, like petitioner, is aware of the injury and the alleged tortfeasor's identity—from his duty to investigate the claim and to make an inquiry "whether another may be liable to him." Pet. App. 105a; see, *e.g.*, *Zeleznik* v. *United States*, 770 F.2d at 22.

Contrary to petitioner's suggestion, there is no material distinction between lack of knowledge of an

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[4] As the en banc court of appeals noted, there is no evidence that "the treating physicians 'held themselves out as agents and employees of the private health facility' so as to mislead or deceive [petitioner] or otherwise hide their legal identity as federal employees." Pet. App. 106a. Thus, the cases dealing with fraudulent concealment or misrepresentation cited by petitioner (Pet. 19-20), including *Van Lieu* v. *United States*, 542 F. Supp. 862, 866 (N.D.N.Y. 1982), are not in point.

alleged tortfeasor's legal relationships with other potential defendants and any number of other facts relevant to an FTCA action that plaintiffs would label as "critical" in order to excuse late-filed claims.[5] Thus, petitioner's reading of *Kubrick* would undermine the "deliberate balance" Congress struck in the FTCA "whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government." Pet. App. 91a. For that reason, the courts of appeals have rejected the position petitioner espouses here. See, *e.g.*, *Zeleznik* v. *United States*, 770 F.2d at 23-24; *Dyniewicz* v. *United States*, 742 F.2d 484, 486-487 (9th Cir. 1984); *Diminnie* v. *United States*, 728 F.2d 301, 303-306 (6th Cir.), cert. denied, 469 U.S. 842 (1984); *West* v. *United States*, 592 F.2d 487, 492-493 (8th Cir. 1979).[6]

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[5] For example, a plaintiff might seek to excuse a late-filed claim by arguing that he was unaware of jurisdictional facts necessary to institute the lawsuit in the proper court, *e.g.*, the defendant's principal place of business, or against the proper defendant, *e.g.*, the defendant's legal corporate representative.

[6] Petitioner's reliance (Pet. 20) on *McGowan* v. *Williams*, 623 F.2d 1239 (7th Cir. 1980), and *Chambly* v. *Lindy*, 601 F.Supp. 959 (N.D. Ind. 1985), is baffling. In *McGowan*, the court of appeals held only that "an action brought against a federal driver in state court within the time limitation of [Section] 2401(b) is timely for purposes of the [FTCA] when the action is removed to federal court pursuant to Section 2679." 623 F.2d at 1244. In *Chambly*, the district court merely refused to dismiss plaintiff's FTCA action where the government had failed to respond to a timely filed administrative claim. 601 F. Supp. at 964. Finally, petitioner's citation (Pet. 20) to *Harris* v. *Burris Chem., Inc.*, 490 F. Supp. 968 (N.D. Ga. 1980), is off the mark, since that case involved the jurisdictional requirement of exhausting administrative remedies under the FTCA.

2. Petitioner also contends that, where a plaintiff has "no reasonable knowledge" that the federal limitations statute applies, the Fifth and Tenth Amendments "prohibit the application of [that statute] when a state statute of limitations was complied with by the prosecuting parties." Pet. 25. Petitioner's reliance on the Tenth Amendment is frivolous, since the FTCA's two-year statute of limitations—by virtue of the Supremacy Clause—preempts any inconsistent state law. See *Felder* v. *Casey*, 487 U.S. 131 (1988). And that federal limitations provision, which reflects "the balance struck by Congress in the context of tort claims against the Government," *Kubrick*, 444 U.S. at 117, plainly satisfies the demands of the Due Process Clause. As this Court has recognized, a statute of limitations, "although affording plaintiffs what the legislature deems a reasonable time to present their claims, [also] protect[s] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

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